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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 NATASHA SEVERIN, *et al.*,

4 Plaintiffs,

New York, N.Y.

5 v.

10 Civ. 9696 (DLC)

6 PROJECT OHR (OFFICE FOR
7 HOMECARE REFERRAL), INC., *et*
al.,

8 Defendants.

9 -----x

10 HELENA SCHABOWSKA, *et al.*,

11 Plaintiffs,

12 v.

11 Civ. 6001 (DLC)

13 PROJECT OHR (OFFICE FOR
14 HOMECARE REFERRAL), INC., *et*
al.,

15 Defendants.

16 -----x

17
18 December 16, 2011
19 12:10 p.m.

20 Before:

21 HON. DENISE L. COTE,

22 District Judge
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APPEARANCES

BERANBAUM MENKEN, LLP

Attorneys for Plaintiffs Natasha Severin, *et al.*

BY: JENNIFER SMITH

JASON ROZGER

ROBERT WISNIEWSKI

Attorney for Plaintiffs Helena Schabowska, *et al.*

MINTZ LEVIN

Attorneys for Defendants

BY: JENNIFER B. RUBIN

MIKE ARNOLD

MICHAEL A. CARDOZO, Corporation Counsel

for the City of New York

Attorneys for Defendants HRA, The City of New York
and Robert Doar

BY: ASHLEY HALE

BEN WILIKSEN

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1 (In open court)

2 THE DEPUTY CLERK: The first case is Severin and
3 others v. Project OHR, Inc. *et al.*

4 Counsel for the parties please state your name for the
5 record. We will start with counsel for the plaintiffs

6 MS. SMITH: Jennifer Smith and Jason Rozger, from
7 Beranbaum Menken.

8 THE DEPUTY CLERK: And for the defendants.

9 MS. RUBIN: Jennifer Rubin and Mike Arnold for Project
10 OHR and Dvorah Kohn.

11 THE DEPUTY CLERK: That is for case No. 10 Civ. 9696.

12 For the matter Schabowska v. Project OHR, Inc. and
13 others. That is case No. 11 Civ. 6001. Counsel for the
14 plaintiff.

15 MR. WISNIEWSKI: Robert Wisniewski.

16 THE DEPUTY CLERK: For the defendants.

17 MS. RUBIN: Jennifer Rubin and Mike Arnold for Project
18 OHR and Dvorah Kohn.

19 MS. HALE: And Ashley Hale and Ben Wiliksen for city
20 defendants.

21 THE COURT: Ms. Smith, are you joined at counsel table
22 by a colleague?

23 MS. SMITH: Yes. This is Jason Rozger with me.

24 THE COURT: I think this is my first conference in the
25 6001 case, and we will get to that in a moment. I thought I

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1 would address open issues in the other case that has been
2 assigned to me for some time.

3 This is a case in which the parties are disputing,
4 among other things, the applicability of an FLSA companion
5 exemption. The FLSA claim was dismissed as to one of the two
6 plaintiffs but it survived as to one plaintiff, Ms. Severin.
7 She has brought a motion for partial summary judgment on the
8 affirmative defense of the companionship exemption. There is
9 also a request here for the plaintiff to issue a collective
10 action notice.

11 I have read the papers that the parties have submitted
12 on these two applications and am prepared to rule.

13 First let me start with you, Ms. Smith. Is there
14 anything you want to say briefly in connection with either of
15 these requests beyond what you have said in the papers?

16 MS. SMITH: No, your Honor. I believe it is all in
17 the papers that we have already submitted.

18 THE COURT: Thank you so much.

19 Ms. Rubin, is there anything that the defendants wish
20 to add beyond what is said in their papers?

21 MS. RUBIN: No, your Honor, but we are prepared to
22 answer any questions your Honor may have about the papers.

23 THE COURT: Thanks.

24 So let's talk about the summary judgment motion first.
25 There is some debate in the parties' papers about the burden of

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1 proof, and of course at trial it is undisputed that the burden
2 of proof in an affirmative defense would be on the defendant.
3 It is a defense. They would have the burden of proving it.
4 But the defendant here has not moved for summary judgment on
5 that defense. It is the plaintiff that has moved for partial
6 summary judgment on that defense. And in the context of a
7 partial motion for summary judgment brought by the plaintiff,
8 the plaintiff has the burden of proving that there are no
9 disputed material issues of fact that might require a trial.
10 The plaintiff in this case has not carried that burden. There
11 are questions of fact that exist with respect to the amount of
12 time that Ms. Severin spent on general household work and,
13 indeed, whether she performed general household work. Those
14 issues will require a trial.

15 Let's turn then to the issue of collective action
16 notice. I appreciated the opportunity the parties took to
17 educate me about the FLSA companionship exemption. The opinion
18 that I issued in this case previously spent more time analyzing
19 the New York labor law exemption, and the companionship
20 exemption under federal law was not at the center of that
21 motion practice. So I have had a chance, in connection with
22 this litigation, to look at 29, C.F.R., 552.6, and of course
23 the statutory exemption provision in general which is Section
24 213. I have also looked at the opinion letter from the
25 Department of Labor, which can be found at 1995 WL 1032475, and

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1 reviewed the parties' submissions.

2 I think it is premature to issue a collective action
3 notice, and I am not sure that one will ever be appropriate in
4 this case. Under the FLSA, the companionship exemption will be
5 a complete bar to liability. The kinds of jobs that the
6 companions hold are individualized. They each have separate
7 patients or clients; they have to tailor their duties --
8 indeed, their hours -- everything to the needs of the
9 individual client; they are working under general protocols and
10 training and supervision that would, if anything, enforce the
11 exemption and not permit a violation of the FLSA.

12 So the plaintiff would have to establish on an
13 individual plaintiff-by-plaintiff basis that somehow they
14 performed general household work more than 20 percent of the
15 time, and of course any work, household work, that is related
16 to the fellowship, care or protection of their client wouldn't
17 negate the exemption. So there are so many fact-specific
18 inquiries -- what kind of household work was performed; was it
19 related to the fellowship, care and protection of the client;
20 if it was not so directly related such that it could be
21 considered general household work, did it constitute more than
22 20 percent of the time that the individual spent in that
23 client's home or environment.

24 So these are very fact-specific inquiries that aren't
25 really susceptible, I think, to a similarly-situated person

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1 analysis that would support the issuance of a collective action
2 notice. So I am going to decline to issue one at this time.

3 Now, we have the beginning of a motion to dismiss.
4 The motion has been made with respect to an individual
5 defendant Ms. Kohn. I don't know if, Ms. Smith, you are
6 planning to litigate this motion or if you are going to consent
7 to dismissal of the claims against Ms. Kohn. Have you given
8 that some thought?

9 MS. SMITH: We have, your Honor, and we haven't made a
10 final decision on that yet.

11 THE COURT: Can you make a decision by Monday?

12 MS. SMITH: Yes.

13 THE COURT: Thank you.

14 MS. RUBIN: Judge, if I can clarify, that was a motion
15 for summary judgment as to Ms. Kohn, not a motion to dismiss.

16 THE COURT: Thank you very much. Yes. I misspoke.

17 So please write a letter to the court and defense
18 counsel by Monday, Ms. Smith, indicating whether or not you are
19 going to be opposing. If you are going to oppose, let's set a
20 schedule.

21 Normally the opposition would be due next week, the
22 22nd, but as we all know we are in the midst of the holiday
23 season and I am sure everyone's willing to adjust schedules
24 appropriately.

25 Ms. Smith, when did you want your opposition due?

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1 MS. SMITH: I don't have a calendar in front of me,
2 but could we do it the end of the first week of January?

3 THE COURT: OK. Opposition would be due January 6th.
4 Should we say reply due January 13th, Ms. Rubin?

5 MS. RUBIN: That would be fine, your Honor.

6 THE COURT: But again, Ms. Smith is going to let
7 Ms. Rubin know by Monday whether or not there is going to be a
8 consent with respect to this motion.

9 Now, we had completed fact discovery in the case, in
10 the Severin case, 9696. Obviously, we have had some summary
11 judgment practice here. So I don't know if, Ms. Smith, you are
12 intending to seek class certification on the New York Labor Law
13 claim, or not.

14 MS. SMITH: Yes, your Honor, we are. Actually, that
15 was something we wanted to raise with you today. We would like
16 to seek class discovery. At this point the discovery that we
17 have done thus far has been limited to the individual
18 plaintiff's claims. So we have not done any discovery beyond
19 that.

20 THE COURT: Have you discussed with Ms. Rubin what
21 additional discovery you want to take.

22 MS. SMITH: No. I actually sent a request earlier
23 this week that we discuss it, but we had agreed to see what
24 your Honor had to say today.

25 THE COURT: Well, it is a little hard to talk about it

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1 in the abstract if you haven't described to Ms. Rubin precisely
2 what discovery you want to take. It is a little hard for her
3 or for me to know if it sounds appropriate or burdensome or
4 really to react at all.

5 MS. SMITH: OK. Right now there is an anticipated
6 class of about 1700 other employees, and some of them did work
7 overnight hours, some of them did work overtime, some of them
8 did not. So we would want just some representative information
9 about the hours that people were working for one thing.

10 THE COURT: What do you mean? How do you intend to
11 get representative information? What do you mean?

12 MS. SMITH: Well, a sample of current and former
13 employees, and the defendants have kept pay records showing the
14 hours, weekly time attendance records showing the time that
15 everybody is working.

16 THE COURT: So you want some payroll records.

17 MS. SMITH: Right, a sample.

18 MR. ROZGER: Your Honor, we may need some samples of
19 paper records, but there are computerized pay records which
20 will show exactly who would be in the class and who wouldn't
21 and how much they are owed, if anything. We think the
22 electronic discovery of the payroll system is probably the main
23 thing that we need for class discovery.

24 THE COURT: Did you want sampling of that? Is that
25 what you are describing?

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1 MR. ROZGER: I think we would need the electronic
2 records for the entire class or potential class. Depending
3 upon if there are gaps or inconsistencies, we may need sampling
4 of paper records to back that up, or we may not. If the
5 electronic data is consistent and complete, that may be all we
6 need.

7 THE COURT: So you don't want samples, at least
8 initially.

9 MR. ROZGER: Yes.

10 THE COURT: What you want is the electronic payroll
11 records for 1700 employees?

12 MR. ROZGER: Yes.

13 THE COURT: Anything else?

14 MR. ROZGER: That is the main thing, your Honor.

15 THE COURT: Ms. Rubin.

16 MS. RUBIN: Judge, I am not quite sure what payroll
17 records for 1700 employees is going to show other than
18 providing the relief that they sought in effect for the
19 collective action notice.

20 THE COURT: They cannot send out a collective action
21 notice without approval of the court.

22 MS. RUBIN: What I would suggest we do is to have
23 Ms. Smith indicate what type of employee they would be
24 interested in getting information about and then we could
25 provide that information on a much more limited basis, which

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1 would be less burdensome to my client. Then if plaintiff
2 wished to depose these individuals, then we would be happy to
3 propose a limited sampling of current employees -- of course,
4 we have no control over former employees -- to appear and sit
5 for their deposition.

6 THE COURT: OK. So I think that this is not really
7 fruitful for us to discuss on the record in the first instance.
8 It would be helpful if counsel would discuss these issues with
9 each other, face to face -- I am happy to give you my jury room
10 today -- and try to reach an understanding.

11 I could see everybody at 2:00. So that would give you
12 a chance to have a discussion about discovery. I want you to
13 try to reach an agreement, if you can. But if you can't,
14 explain your reasons to the other side in detail so you have
15 thoroughly discussed the issues.

16 I will see you back at 2:00 to set a schedule for the
17 remainder of this litigation.

18 Good. Let's turn then to the Schabowska case, 6001.

19 Let me ask, is there any reason to keep a court
20 reporter for the remainder of this conference?

21 Does anyone require the services of a court reporter
22 for the remainder of this scheduling conference?

23 MR. ROZGER: Not from our side, your Honor.

24 MR. WISNIEWSKI: No, your Honor.

25 MS. HALE: No, your Honor.

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MS. RUBIN: No.

THE COURT: We are going to close the record then.

Thank you.

(Adjourned)